IN THE HIGH COURT OF JUDICATURE OF BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.70 OF 2006

Mehraj M.A.Quariashi. ..Appellant.

V/s.

Dy.Salt Commissioner & Ors. ..Respondents.

Mr.A.H.Khatri for appellant.

Mr.Rajiv Chavan a/w Ms.Rutuja Ambekar for respondent.

Mr.Khadapkar, AGP for respondent No.3.

CORAM: A.M.KHANWILKAR,J

DATE : APRIL 18, 2006.

P.C. :

1. Heard counsel for the parties.

2. Admit.

3. Mr.Chavan waives notice for respondent. Mr.Khadapkar waives notice for respondent No.3.

4. As short question is involved, appeal is taken up for final hearing forthwith by consent.

5. This appeal takes exception to the order passed by the Civil Judge Senior Division, Palghar dated 9th December, 2005. By this order lower court

has rejected the application preferred by the appellant being MCA No.46 of 2001 Exh.59 praying for restoration of suit which was dismissed on 20th August, 2001. The court below has essentially found that the appellant was not diligent in pursuing the proceeding. Secondly, the appellant has not made out sufficient cause for condoning delay and that the stand taken by him is not truthful version but he is telling lies to the court.

6. In so far as, first finding recorded by the lower court that the appellant was not diligent, that is on the premiss that the suit was no doubt kept in sine die on 4th September, 99, however, it was removed from that list and placed for hearing on 6th September, 2000. Thereafter, the matter was considered by the lower court for the relief of vacating status quo on 5th February, 2001. Besides, by the order dated 12th March, 2001 suit was fixed for hearing but on that date i.e. on 12th March, 2001 the plaintiff remained absent and his advocate sought adjournment on that count. The suit was then listed on 18th June, 2001, on which date both the parties were absent. The matter was then notified on 20th August, 2001 when once again the plaintiff remained absent resulting in dismissal of suit for

default. Going by these dates, although it is possible to accept the position that the plaintiff was not diligent on 12th March, 2001, 18th June, 2001 as well as 20th August, 2001, on three consecutive dates when suit was placed for hearing; however, on 12th March, 2001 the advocate for plaintiff did appear before the court. In that sense only on two dates i.e. on 18th June, 2001 and 20th August, 2001 neither the plaintiff/appellant nor his advocate appeared. In so far as that non-appearance, it is not possible to suggest that the plaintiff was persistently not diligent in pursuing his remedy. In so far as absence of 20th August, 2001 is concerned, the explanation has been offered by the applicant in the subject application that he could not attend the court because of tremendous pressure and stress due to numerous legal entanglements, financial problems, health problems in the family. Indeed, the court below has found that the appellant has failed to produce any cogent record to substantiate the ground of health problem in the family. However as it is not a case of intentional default committed by the appellant, the appellant can be shown indulgence by imposing substantial cost to be paid by the appellant to the respondent, which order will serve the ends of justice.

6. The other reason however, recorded by the trial court is that the explanation offered by the appellant has not been substantiated by any evidence. Besides, the appellant has not come to the court with clean hands. In so far as this finding of the trial court is concerned, it is possible to uphold the view taken that the explanation offered by the appellant is not fully substantiated by evidence. However, it is not a case of appellant having approached the court with unclean hands. This is so because the applicant has not stated any such ground in his application which can be said to be false. It is a different matter, if the explanation cannot be accepted as it is. However, as mentioned earlier, I am inclined to show indulgence to the appellant in the interest of justice on condition that appellant will compensate the respondent for the legal costs suffered by him.

7. Accordingly, the impugned Judgment and order is set aside, instead the application being MCA No.46 of 2001 is allowed on condition that the appellant shall pay costs to the respondents Nos.1 to 3 quantified at Rs.7,500/- each. Costs will have to be paid within four weeks from today. Acknowledgement

thereof be produced before the trial court, failing which the trial court to proceed on the assumption that the order passed on 9th December, 2005 is revived, ignoring operative order passed in the present appeal.

8. Appeal disposed of on the above terms.